IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-545

GENERAL GMC TRUCKS, INC.,
Petitioner,

VS.

GENERAL MOTORS CORPORATION, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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Petitioner General GMC Trucks, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Georgia entered July 14, 1977, in which that court refused to reconsider its decision of June 23, 1977 in which it held 1976 Georgia Laws 1448 [Georgia Code §84-6610 (f)(10)] unconstitutional as violative of the commerce clause of the United States Constitution.

OPINIONS BELOW

The original decision of the Georgia Supreme Court, as well as the decision denying Petitioner's Motion for Rehearing, are reported at 239 Ga. 373 — S.E. 2d —

(1977) and are reprinted in Appendix A hereto. The opinions of the Superior Court of Fulton County (R 124)[1] and the Georgia Franchise Practices Commission (RGFPC 44)[2] are not reported but appear respectively as Appendix B and Appendix C hereto.

JURISDICTION

The original decision of the Georgia Supreme Court was entered June 23, 1977 and Petitioner General GMC Trucks, Inc. timely filed its Motion for Rehearing with that Court. That motion was denied, finally terminating the proceedings in the Georgia Supreme Court on July 14, 1977. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

May a state legislature, for the purpose of the public welfare and in the exercise of its police power, require a manufacturer of automobiles, trucks or farm machinery, prior to the manufacturer's granting an additional franchise in a trading area already served by an established franchise of that same manufacturer that is complying with its franchise agreement and is adequately representing the manufacturer in the trading area, to make a minimum, reasonable showing that

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1 The designation "R" refers to pages in the record filed with the Supreme Court of Georgia.

2 The designation "RGFPC" refers to pages in the record of the proceedings before the Georgia Franchise Practices Commission which is a part of the record before the Georgia Supreme Court.

the proposed franchise will not damage the business of the existing franchisee?

STATUTES INVOLVED

At issue in the case presented by this Petition is the application of Article I, §8 of the United States Constitution which provides:

> "The Congress shall have power to regulate commerce with foreign nations, and among the several states, ..."

The statute tested by that constitutional provision is 1976 Ga. Laws 1448, Ga. Code §84-6610(f)(10) which provides:

> "The Commission may deny an application for a license or censure, suspend or revoke a license after it has been granted for any of the following reasons . . . [an applicant] being a manufacturer, factory branch, distributor, wholesaler or their branches or representatives, who . . . has evidenced his intent to grant an additional franchise for any line make of motor vehicle, construction equipment or farm machinery, in any community or territory where a franchise dealer of the same line make of motor vehicle, construction equipment or farm machinery is complying with the terms of his franchise or selling agreement unless the manufacturer, distributor, wholesaler, or their branches or representatives can demonstrate that such franchise dealer is not providing adequate representation in the community or territory or that the addition of another dealer can be accomplished without causing a reduction in the business of the existing dealer; . . . ."

In construing that statute, the declaration of public policy by the Georgia Legislature is relevant, and is found at 1976 Ga. Laws 1441, Ga. Code §84-6602:

> "The General Assembly finds and declares that the distribution and sales of motor vehicles, construction equipment and farm machinery in the State of Georgia vitally affects the general economy of the State and the public interest and the public welfare, and the General Assembly finds, in the exercise of its police power, that it is necessary to regulate and to license persons who manufacture, distribute and sell motor vehicles, construction equipment or farm machinery so as to adequately assure a sound system of distribution of motor vehicles, construction equipment and farm machinery to the public so as to promote the public health, safety and welfare. This Chapter shall be liberally construed to attain the stated purpose."

Also relevant to the inquiry at hand are Sections of the Federal Automobile Dealers Day-in-Court Act, 15 U.S.C. §§1221, et seq. A portion of that Act, 15 U.S.C. §1222, provides:

> "An automobile dealer may bring suit against any automobile manufacturer engaged in commerce, in any district court of the United States in the district in which said manufacturer resides, or is found, or has an agent, without respect to the amount in controversy, and shall recover the damage by him sustained and the cost of suit by reason of the failure of said automobile manufacturer from and after August 8, 1956, to act in good faith in performing or complying with any of the terms or provisions of the franchise, or in determining, cancelling, or not

> renewing the franchise with said dealer: . . . ."

A latter section of the same Act, 15 U.S.C. §1225, provides:

> "This Chapter shall not invalidate any provision of the laws of any state except insofar as there is a direct conflict with an express provision of this Chapter and an express provision of state law which cannot be reconciled."

STATEMENT OF THE CASE

General GMC Trucks, Inc. (hereinafter referred to as "General GMC") is a motor vehicle dealer, registered under the Georgia Motor Vehicle Franchise Practices Act of 1974 and the Georgia Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act of 1976. For the last thirteen years, the Petitioner has held a franchise agreement with General Motors (hereinafter referred to as "GM") which authorized the Petitioner to sell heavy duty trucks, including the "9500 series" vehicle, within the Atlanta metropolitan area. (T 15)[3] Moreover, the contract requires General GMC to maintain adequate facilities, staff, equipment and parts inventory to perform the required warranty and maintenance services on the vehicles it sells. (T at Petitioner's Exhibits 1 and 2) Since 1970, the Petitioner's designated area of primary responsibility has included all the metropolitan Atlanta area, including Fulton and Cobb Counties. (T at Petitioner's Exhibits 1 and 2)

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[3] The designation "T" indicates a citation to the transcript of the administrative hearing which is a part of the formal record in the Georgia Supreme Court.

In each of its routine, corporate evaluations, GM has found the Petitioner to be an outstanding dealer doing an effective job under its franchise agreement. (T 268-272; 300; T at Petitioner's Exhibits 3 through 6) Indeed, GM has stated that it is not presently aware of any area of franchise non-compliance by General GMC.

The record in this case demonstrates the tremendous financial burden involved in the operation of a heavy duty GM truck franchise, including large expenditures for its facilities, maintenance, staff and inventory in order to do the required warranty work and to serve the consuming public. (T 257, 258 and 293-297) Such expenditures are necessarily made in reliance upon the franchise agreement and its continuing value. (T 257 and 293-297)

On October 9, 1975, and again on November 1, 1975, GM issued a franchise to the respondent Trade City GMC, Inc. (hereinafter referred to as "Trade City") which purported to authorize Trade City to sell and service the same line make of motor vehicles, including the "9500 Series", as does the Petitioner. The community or territory specified in the proposed new franchise given to Trade City is exactly the same community or territory presently contained in the Petitioner's area of primary responsibility. (T at Stipulations of Documents and Facts) In fact, the proposed new franchise specifically obligates Trade City to sell and service such vehicles in the exact same geographic area presently included in General GMC's franchise. (T at Stipulations of Documents and Facts)

The "area of primary responsibility" is, among GM

franchisees, an element of key importance. Not only is it a determinative factor in the profitability of the venture, it is also used to determine the level of initial investment and continuing operating capital required by GM of the franchisee. Moreover, GM's evaluation of the franchisee's performance is keyed to this defined primary market area. (T 38, 45 and at Petitioner's Exhibits 3 through 6) Such evaluations, and thus the integrity of the "area of primary responsibility", are critical to the Petitioner because its franchise agreement with General Motors is non-exclusive and may be terminated by General Motors if, among other things, General GMC fails to meet GM's sales guidelines in that market area. The setting of such guidelines is, however, entirely within the discretion of GM. [T at Petitioner's Exhibits 1 (Art. IV, p. 20) and 6]

On September 29, 1975, General GMC, having heard of the proposed new franchise, filed a complaint with the Georgia Motor Vehicle Commission, alleging that GM and Trade City were in violation of 1976 Georgia Laws 1448, Georgia Code §84-6610(f)(10). Specifically, the complaint, as amended, asserted that General GMC was the holder of a bona fide franchise pursuant to an agreement with GM which authorized it to sell and service GM heavy duty trucks within the Marietta-Cobb County area, among others; that it had fully performed its obligations under the franchise agreement; and, that it had adequately represented GM in its franchise area. Relying on the section of the 1976 Georgia Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act at issue, General GMC alleged that GM and Trade City were violating the Act by establishing a new franchise for the same motor vehicle and in the same community or

territory as General GMC without the required showing that the Petitioner's business would not be damaged. In response, GM and Trade City asserted a comprehensive constitutional attack on the Act as a whole, alleging forty-seven different claims of the Act's unconstitutionality under both the Georgia and United States Constitution. (R 256-277)

On May 27, 1976, the Georgia Franchise Practices Commission entered a summary of the evidence, findings of fact and conclusions of law. The Commission's order upheld the constitutionality of the statute and, on the merits, held that GM had failed to show that General GMC was in breach of its franchise agreement or that it was not providing adequate representation in its community or territory. The Commission concluded, therefore, that the statutory conditions which would authorize the placing of a second franchise in the Petitioner's community or territory had not been established. On that basis, the Commission prohibited GM from granting or continuing any franchise agreement with Trade City which would allow Trade City to purchase or sell the "9500 Series" heavy duty trucks. Trade City was similarly prohibited from entering into any agreement or continuing any agreement with GM for such purpose. (RGFPC 45-46)

Pursuant to the Georgia Administrative Procedure Act, GM and Trade City filed notices of appeal with the Fulton Superior Court. (R 1-3) That Court, acting as an appellate court and speaking through Judge Jack Etheridge, reversed the Commission, holding:

"1. That Georgia Code §84-6604(a) which created the 'Georgia Franchise Practices Commission' was unconstitutional under the due process clauses of

the Georgia and United States Constitutions because the Commission as created by that section was not fair and impartial;

2. That Georgia Code §84-6610(f)(10) was unconstitutional under the supremacy clause of the United States Constitution because that section restrains trade in conflict with the federal anti-trust laws as provided in 15 U.S.C. §§1 and 2, et seq.; and,

3. That Georgia Code §84-6610(f)(10) was unconstitutional under the commerce clause of the United States Constitution because it creates an undue burden on interstate commerce."

(R 124-129)

General GMC then appealed to the Georgia Supreme Court. In its opinion of June 23, 1977 (239 Ga. 373), that Honorable Court held that General GMC was properly before the Commission and, thus, the Court, because it had perfected its rights under the 1976 Act. On the constitutional issues, the Court first reversed the Fulton Superior Court on the procedural due process issue. The Court concluded that the Commission, which by statute must have five dealer members, was not per se violative of the due process clause of the United States Constitution as a biased tribunal. Recognizing the presumption of impartiality, the Court ruled that GM and Trade City had not produced evidence to contradict that presumption.

On the issue now offered for appeal to this Court, the Georgia Supreme Court held that Georgia Code §84-6610(f)(10) is unconstitutional as violative of the commerce clause of the United States Constitution. Recognizing that a state statute may affect interstate commerce as long as, on balance with the statute's

legitimate local purposes, the effects are not excessive, the Court determined that under federal precedent, the Act was not "affected with the public interest" and, in any event, the statute was beyond the legislature's police power. Thus, in the Court's view, the statute is unconstitutional because it had an impermissible impact on interstate commerce.[4] The Court, therefore, affirmed the Court below to the effect that no statutory rights of the Petitioner were violated by the actions of GM and Trade City.

After the denial of its timely motion for rehearing to the Georgia Supreme Court, the Petitioner General GMC filed its Petition for Writ of Certiorari within the time permitted by law.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW ADDRESSES A SUBSTANTIAL FEDERAL QUESTION AS YET UNDETERMINED BY THIS COURT, IS IN IRRECONCILABLE CONFLICT WITH BOTH FEDERAL AND STATE COURT DECISIONS, AND SERIOUSLY UNDERMINES THE VALIDITY OF SIMILAR STATUTES IN A MAJORITY OF THE STATES. THE RESULTING UNSETTLED QUESTION OF FEDERAL CONSTITUTIONAL LAW SHOULD BE DECIDED BY THIS COURT.

In 1948, Mr. Justice Black, in a dissenting opinion, observed that ". . . dealers are thus economic dependents of the company whose cars they sell." *Ford Motor Co. v. United States*, 335 U.S. 303 (1948). Even

[4] With this ruling, the Court felt it unnecessary to address the anti-trust-supremacy clause arguments of General Motors.

with such a warning, the industry practices, unfortunately, have not changed since 1948. (T 44)

As all consumers know, maintenance, warranty and dependability are key elements of the advertising pitch of the major automobile and truck manufacturers. However, it is the franchise dealer, and not the manufacturer, that is responsible to the public for warranty and maintenance work on new motor vehicles. The manufacturer expressly shifts this responsibility to the dealer by contract. (T at Exhibits 1 and 2) The consuming public thus has an absolute dependence upon the franchise dealer whose business must remain viable if he is to deliver on the manufacturer's promises of dependability and service.

The disproportionate economic leverage held by a manufacturer over a franchise dealer has resulted in an industry-wide contract practice, clearly exemplified by the Petitioner's contract with GM, that reserves the utmost in rights to the manufacturer and grants few, if any, rights to the dealer. (T at Petitioner's Exhibits 1 and 2) Though bilateral in form, such contracts are unilateral in fact and are commonly known in the law as "contracts of adhesion".

In this case, GM has required of the Petitioner, by contract, a capital investment of over $1,000,000 and the Petitioner has actually invested over $2,500,000. (Petitioner's Exhibit 1 to Transcript) That investment is for one purpose and one purpose alone — selling and maintaining heavy duty trucks. Having committed that large sum of money to this highly specialized purpose, the dealer does indeed become an economic captive of his manufacturer. Further, if his capacity to gainfully employ that sizeable investment

is compromised or withdrawn, such action truly results in "an economic death sentence". *See* the "Automobile Dealer Franchises: Vertical Integration by Contract", 66 Yale Law Journal, 1135, at 1156 (1975).

As a result of the unconscionable industry practices represented in the standard franchise agreement, like the one that appears in this case, the United States Congress and some thirty-seven states have, under their inherent police powers, passed laws designed to protect the public interest in the supply and maintenance of motor vehicles by providing some minimum assurances to franchise dealers who otherwise are at the complete mercy of the manufacturers. (Attached hereto as Appendices "D" and "E" are citations to such statutes) Eighteen states have enacted statutes quite similar to the Georgia statute involved in this case. (See Appendix "D") The purpose of these statutes is to provide an existing franchise dealer with certain minimum protection so that he can maintain his dealership as a viable business capable of performing the maintenance and warranty services needed by the public and avoided by the manufacturer.

The federal "Automobile Dealer Day in Court Act", 15 U.S.C. §§1222-1225, has the same purpose, a purpose which has been upheld by the courts. *See Volkswagen Interamericana, S.A. v. Rohlsen*, 360 F. 2d 437 (1st Cir.), *cert. denied*, 385 U.S. 919 (1966). Indeed, the *Volkswagen Interamericana* court specifically recognized the public purpose to be served in providing certain minimum franchise protection to the over forty thousand franchise dealers and to the consuming public at large. 360 F. 2d 437 at 445. The federal act specifically reserves to the states the power to enact similar supporting legislation. 15 U.S.C. §1225. Lastly, in addition to the nineteen states which grant existing franchise dealers protection from the arbitrary placement of additional franchises within their communities, eighteen other states provide minimal franchise protection through statutes which prohibit the manufacturer from arbitrarily cancelling the franchise, absent good cause. (See Appendix "E")

Therefore, there are thirty-seven states which have statutes that will be affected by a decision in this case. Since the vast majority of state legislatures, in their independent considerations, have determined that the public interest of their constituents would best be served by statutes they each clearly felt was within their police power, the decision of the Georgia court contrary to the views of these legislatures presents a special and important occasion for the granting of a writ of certiorari by this Court. Historically, the decision of the highest court of a state holding a state statute violative of the federal constitution is ripe for review by this Court by a writ of certiorari where the decision brings into question the constitutionality of similar statutes in force in a large number of other states. *See California v. Byers*, 402 U.S. 424 (1971); *People of the State of New York v. O'Neill*, 359 U.S. 1 (1959).

To the Petitioner's knowledge there are at the present time suits pending in five other states which have statutes similar to the Georgia statute here in issue. Those suits challenge those state statutes on substantially the same constitutional grounds which are in issue in the instant case. In California, a three-judge federal district court has ruled a comparable provision of the California statute to be unconstitutional as a denial of due process. *Orrin W. Fox Co., et al. v. New*

Motor Vehicle Bd. of the State of California, et al., (United States District Court for the Central Division of California, Civil Action No. 76-1200WPG, decided September 15, 1977).[5] Two other California cases involving similar issues are presently on appeal to the Third District Court of Appeals of the State of California. *Toyota Motor Div. Inc. v. State of California, et al.*, (Sacramento Superior Ct., 225959 decided November 12, 1976) and *Fresno Imports, Inc., et al. v. State of California, et al.*, (Sacramento Superior Ct., 225991, decided November 12, 1976.)

A similar Virginia statute is being challenged on the same constitutional grounds in the case of *American Motors Sales Corp. v. Division of Motor Vehicles of the State of Virginia* (U.S. District Court for the Eastern District of Virginia, Civil Action No. 76-0513-RR.) It is the Petitioner's understanding that both parties have submitted motions for summary judgment and that the court has them under consideration at the present time. In North Carolina, a comparable statute has been challenged in the case of *Barringer and Gaither, Inc. v. Kenworth Truck Co.*, (General Court of Justice, Superior Court Division, Wake County, N.C., No. C-77-CVS-4737). It is the Petitioner's understanding that the trial court, in an order entered April 28, 1977, sustained the North Carolina statute against similar constitutional attacks and that the case is now on appeal in the North Carolina ap-

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5 It is the Petitioner's understanding that a direct appeal to this Court will be taken by the State of California in the *Orrin W. Fox Co.* case and, if an appeal is filed in that case, the Petitioner respectfully suggests that it would be appropriate to consolidate this petition with that case.

pellate courts. A Rhode Island statute similar to Georgia's is being challenged on the same constitutional grounds in *Stevens Auto Sales, Ltd. v. Rhode Island Motor Vehicle Dealers' License Commission, et al.* (United States District Court for Rhode Island, Civil Action No. 77-0041). (It is Petitioner's understanding that at least one automobile manufacturer has joined in the challenge to the Rhode Island statute.)

Beyond the current litigation cited above, many state courts have previously reviewed and upheld statutes similar to the one at issue here. A leading case is *Ford Motor Company v. Pace*, 206 Tenn. 559, 335 S.W. 2d 360 (1960). In that case, the Tennessee Supreme Court upheld a state statute which is quite similar to the Georgia statute. The attack made in that case is essentially the same attack made in this case by GM. In *Pace*, the Tennessee Court was quite emphatic in pointing out the state's need to regulate the awesome imbalance of power between dealers and manufacturers:

> "The legislature . . . found the [dealer] at a disadvantage in this respect, and, by this enactment undertook to place him and the [manufacturer] more nearly upon an equality. *This alone commends the Act and entitles it to a place on the statute book as a valid police regulation.*" (Emphasis added)

335 S.W. 2d at 368.

The validity of a provision in such statutes which limit the granting of new franchises is emphasized in *Plantation Datsun, Inc. v. Calvin*, 275 So. 2d 26 (Fla. App. 1973). In that case the Florida court upheld a section of the Florida franchise law which specified

the conditions under which newly designated franchise dealers could be created. The section of the Florida law upheld there is virtually the same as the provision contained in the Georgia law found in §84-6610 (f)(10). A similar provision in the Wisconsin law withstood all constitutional attacks in the case of *Forest Home Dodge, Inc. v. Karns*, 138 N.W. 2d 214 (Wis. Sup. Ct. 1966). Indeed, that case held that such statutes are remedial in that they recognize the gross disparity of bargaining power between the manufacturer and the local retailer and that they are designed to furnish the dealer some protection against unfair treatment by the manufacturer. Recognizing the remedial quality in such legislation, a Federal court in *Willys Motors v. Northwest Kaiser-Willys*, 142 F. Supp. 469 (D. Minn., 1956) upheld a statute similar to the Georgia law. The Puerto Rico Dealers Act, which is similar in purpose and thrust to the Georgia Act, was upheld from similar constitutional attacks in *Ruiz v. Economics Laboratory, Inc.*, 274 F. Supp. 14 (D.P.R., 1967).

Wisconsin was the first state to enact legislation regulating the business practices between motor vehicle manufacturers and their dealers. In *Kuhl Motor Company v. Ford Motor Company*, 270 Wis. 488, 71 N.W. 2d 420 (1955) the Wisconsin Supreme Court upheld that first pioneer statute. Noting that the promotion of fair dealings is a legitimate exercise of the police power, the Court approved the basic Wisconsin statute against a comprehensive constitutional attack. The Court concluded:

> "The fact that the persons to be benefited by this regulatory measure are confined to one class of our citizens, auto dealers, does not militate against the same as being a legitimate exercise of the police power. As the Connecticut court recently stated in *Amsel v. Brooks*, 1954, 141 Conn. 288, 106 A. 2d 152, 157, a statute which is otherwise within the police power or serves a public purpose is not unconstitutional merely because it incidentally benefits a limited number of persons."

270 Wis. at 490.

In light of the other similar state statutes and considering the extensive previous and now pending litigation involving the same issues but with different results than the case presently before the Court, it appears abundantly clear that the case presented in this petition involves principles of law in need of final determination by this Court. Moreover, the decision is apparently in conflict with several federal decisions that, at least tacitly, have recognized the constitutionality of such statutes.

In *Buggs v. Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940), the court had before it the Wisconsin Motor Vehicle Franchise statute. Although refusing to apply the statute retroactively, the Court acknowledged the law's basic constitutionality. The Federal courts have repeatedly relied upon *Buggs* as having upheld the constitutional validity of state motor vehicle franchise statutes. *See B & T Distributors, Inc. v. Meister Bran, Inc.*, 450 F. 2d 29 (7th Cir. 1972); *Best Motor and Implement Co., Inc. v. International Harvester Co.*, 252 F. 2d 278 (5th Cir., 1958); *Bushwick- Decatur Motors, Inc. v. Ford Motor Co.*, 116 F. 2d 675 (2nd Cir. 1940); *A.F.L. Motors, Inc. v. Chrysler Mo-*

tors Corp., 183 F. Supp. 56 (E.D. Wis. 1960); *E. L. Bowen & Co. v. American Motors Sales Corp.*, 153 F. Supp. 42 (E.D. Va. 1957); *Busam Motor Sales, Inc. v. Ford Motor Co.*, 104 F. Supp. 639 (S.D. Ohio, 1952).

Consequently, the holding of the Georgia Supreme Court is at odds with several federal, as well as many state, decisions on the same topic. Such a decision presents an appropriate case for review by writ of certiorari. *See Missouri Pacific Railroad Co. v. Elmore*, 377 U.S. 134 (1964); *United States v. Union Central Life Insurance Co.*, 368 U.S. 291 (1961). Therefore, this petition should be granted to afford this Court the opportunity to review a decision by the Supreme Court of Georgia which undermines the statutory scheme of a majority of states which have legislated on the same subject and which is in clear conflict with both Federal and State precedents.

II.

THE GEORGIA SUPREME COURT ERRONEOUSLY APPLIED IMPORTANT PRINCIPLES OF FEDERAL CONSTITUTIONAL LAW. IN SO DOING, IT FAILED TO RECOGNIZE THAT A STATE LEGISLATURE, TO ENHANCE THE PUBLIC INTEREST, AS A LEGITIMATE EXERCISE OF ITS POLICE POWER AND WITHOUT VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, MAY REQUIRE A VEHICLE MANUFACTURER TO MAKE A MINIMUM, REASONABLE SHOWING, AS A PREREQUISITE TO PLACING AN ADDITIONAL FRANCHISE IN A TRADING AREA ALREADY SERVED

BY AN ESTABLISHED FRANCHISEE OF THAT SAME MANUFACTURER THAT IS COMPLYING WITH ITS FRANCHISE AGREEMENT AND IS ADEQUATELY REPRESENTING THE MANUFACTURER IN THE TRADING AREA, THAT THE PROPOSED FRANCHISE WILL NOT DAMAGE THE BUSINESS OF THE EXISTING FRANCHISEE.

The critical fault in the reasoning of the Georgia Supreme Court is in its initial premise. In reaching the conclusion that Ga. Code §84-6610(f)(10) violated the Commerce Clause of the United States Constitution, the Court began by stating that the act necessarily burdens interstate commerce because its practical effect is to limit the available market for General Motors products. A studious review of the statute clearly shows this conclusion to be erroneous. First, the statute at issue in no way affects General Motors' decision on the placement of an initial franchise. It does not even take effect until a franchise decision by the manufacturer involves an existing franchisee.

Most importantly, the drafters of the statute have taken every precaution to insure that the manufacturer is not denied access to its ultimate market — the consuming public. Thus, if an existing franchise dealer is not complying with his franchise agreement or is not adequately representing the manufacturer and its products in the trading area, the manufacturer may install whatever new outlets it desires. Moreover, even if the existing franchisee is performing properly, if there is a greater market to be captured by the manufacturer there is no prohibition to the new franchise. Viewed in this light, it can hardly be said that the

statute under attack has restrained General Motors from capitalizing on the opportunities in the market place.

While the statute at issue clearly does not "burden" interstate commerce, by requiring that certain standards be met before a franchise be added within the state, it admittedly affects interstate commerce in the sense that it creates an additional step in the process of altering the franchise arrangement which deals with goods that flow in interstate commerce. It is an elementary principle, however, that that fact alone does not make the statute unconstitutional as a violation of the commerce clause of the United States Constitution. Indeed, most regulation by a state of a business or profession to some degree affects interstate commerce. The question is, whether there is a valid local purpose for the regulation and, if so, can the resulting limitations on commerce be tolerated when balanced with the goals of the regulation. The United States Supreme Court has often articulated this approach:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows. Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved,

> and on whether it could be promoted as well with a lesser impact on interstate activities."

Pike vs. Bruce Church, Inc., 397 U.S. 137 at 142 (1970). *See also, Great Atlantic and Pacific Tea Co. vs. Cottrell*, 47 L. Ed. 2d 55 (1976); *Huron Cement Co. vs. Detroit*, 392 U.S. 400 (1960).

The first step in reviewing the decision of the Georgia Supreme Court is to consider whether or not Ga. Code §84-6610(f)(10) is a valid exercise of the state's police power. Contrary to the view of the Georgia Supreme Court, the statute is a valid exercise of Georgia's sovereign police power. In discussing restrictions of a state's power to legislate, this Court has commented:

> "The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions . . . . It is not subject to definite limitations, but is co-extensive with the necessities of the case and the safeguards of the public interest . . . . It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health . . . . It is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government."

Sligh vs. Kirkwood, 237 U.S. 53 at 58 (1915) (citations omitted) Indeed, the Georgia court overlooked its own precedent which recognizes that the regulation of certain businesses is a valid exercise of Georgia's police power:

> "This Court recognizes the right of the Legislature,

> in the exercise of the police power of the state, to determine what trades or occupations shall be regulated, and the nature and extent of the regulations to be applied . . . . If [the regulation] operates alike on all who come within the scope of its provisions, constitutional uniformity is secured."

Lamons vs. Yarborough, 206 Ga. 50 at 51, 55 S.E. 2d 551 at 552 (1949). *See also, Cooper vs. Rollins*, 152 Ga. 588, 110 S.E. 726 (1926).

The Georgia statute challenged in the present case provides only minimum protection to a Georgia dealer and only minimum limitations on the manufacturer. The manufacturer is free to designate any number of additional franchise dealers in any area of the state where there are no current dealers or where the present franchise dealer in the area either is not providing adequate representation or is in breach of his franchise contract. In any event, there is no bar to placing an additional franchise if the market needs a new dealership. This minimum economic protection for the franchise dealer is of particular importance when it is recognized that the franchise dealers are responsible for servicing the warranty guaranties publicized by the manufacturers in selling their products to the consuming public. Thus, the Georgia statute must be viewed as a constitutionally valid exercise of the state's police power, enacted for the purpose of protecting the well-being of Georgia consumers of new motor vehicles. The need of the public for a reliable, local supply of new vehicles, parts and service, free from unfettered dominance by the manufacturers, is a proper concern for a state legislature.

Once the inherent power of the legislature to enact such a statute is recognized, the reviewing court must determine if there is a legitimate public purpose for such regulations. As illustrated above, there is a wealth of evidence that the goals of the franchise legislation are not only desirable, but necessary. For better or worse, there is probably no other technological advance that has had a greater impact on American society than the automobile. Narrowing the focus to trucks alone, which are the products at issue here, their vast importance as a major supply vehicle cannot be overemphasized.

Because the citizenry needs a system which will effectively deliver and maintain automobiles and trucks, the state has a legitimate interest in the potential abuse of the striking imbalance of economic power between a manufacturer and a local franchise dealer. Since a dealer is solely responsible for enforcement of warranties, the state should be concerned with his continued existence so that he might honor those commitments. Indeed, because of the large investment required of a automobile or truck franchisee, the state has an interest in insuring potential franchisees of some protection of that investment so that he will enter the business in the first place. The Georgia General Assembly, in its declaration of public policy upon enacting the statute at issue here, emphasized this need "to adequately assure a sound system of distribution of motor vehicles . . . to the public . . . ." 1976 Georgia Laws 1441.

If the Georgia General Assembly was alone in discovering and acting upon the problems inherent in the

relationship between dealer and manufacturer, this Court might find it unnecessary to review the Georgia Supreme Court's determination that the statute at issue here is not affected with the public interest. However, Georgia has joined thirty-six other states which have enacted statutes regulating such franchise arrangements. (See Appendices D and E hereto). In order to insure their citizens a steady flow of these necessary products, these states commonly provide franchise dealers protection against such abuses by manufacturers as cancellation of the franchise without good cause, coercion of dealers under threat of franchise cancellation, coercing dealers to accept vehicles or parts not ordered by the dealer and protection against the granting of additional franchises in trade areas already fully served by an existing franchise dealer. For the same reasons, Georgia has provided similar protections. As pointed out above, review of those statutes by the lower courts has resulted in the overwhelming view that such statutes serve a legitimate public purpose and, thus, do not violate the Constitution. *See Volkswagen InterAmericana S.A. vs. Rohlsen*, 360 F. 2d 437 (1st Cir. 1966); *Kuhl Motor Company vs. Ford Motor Company*, 270 Wis. 48, 71 N.W. 2d 420 (1955); *Ford Motor Company vs. Pace*, 206 Tenn. 559, S.W. 2d 360 (1960); *Plantation Datsun, Inc. vs. Calvin*, 275 So. 2d 26 (Fla. App. 1973); *Willys Motors vs. Northwest Kaiser-Willys*, 142 F. Supp. 469 (D. Minn. 1956); *Louisiana Motor Vehicle Commission vs. Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958).

When the reviewing court is satisfied with the legitimate public purpose behind the statute, the next step in the commerce clause test is to balance that purpose

with any burden on interstate commerce the statute might cause. It must be remembered that the statute complained of does not absolutely bar additional franchises. First of all, it does not bar a manufacturer from placing a franchise in an area that is not currently being served. Moreover, the Act permits the addition of a franchise in a currently served area if the current franchisee is either not living up to his contract or is not properly representing the manufacturer in his community or territory. Thus, the statute's restrictions are necessarily limited to those situations where a manufacturer's abuse of its raw power would be most offensive — that is, where the franchisee was abiding by his contract and was doing a good job for the manufacturer. It can hardly be said that such a regulation, in the face of its important goals, nevertheless unduly restricts interstate commerce.

Since there has been no indication of any kind that a manufacturer's ability to profit from the marketing of its products in Georgia is in any way curtailed by the statute, the effects of Georgia Code §84-6610(f)(10) on interstate commerce must be viewed as no more than limited, minimal interferences. This is particularly true because the statute regulates even-handedly and does not give an advantage to a particular local interest which causes a corresponding disadvantage to a similar interstate interest. Given the legitimate state interest to be served by the challenged statute, the incidental, minimal burdens on interstate commerce it may cause are permissible and, therefore, that statute does not intolerably offend the commerce clause of the United States Constitution.

CONCLUSION

In view of the number of the state legislatures that have approved similar statutes and the number of courts, both federal and state, that have approved the constitutionality of similar provisions, it can truly be said that the decision of the Georgia Supreme Court presented for review by this petition is indeed an aberration. That court has decided a federal question of substance not previously determined by this Court and has decided it in a way in conflict with the legislature and courts of the states that have considered the topic. Because the decision presented for review undermines the principles of these other state statutes and decisions, this petition presents special and important reasons for the issuance of a writ of certiorari. With so many courts and legislatures now having their opinions questioned, the time is indeed appropriate for review by this Court.

WHEREFORE, the petitioner General GMC Trucks, Inc. respectfully prays that this its petition for a writ of certiorari to the Georgia Supreme Court be granted and that this Honorable Court review and reverse the judgment of the court below.

Respectfully submitted,
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October 12, 1977

CERTIFICATE OF SERVICE

I, JOHN A. BLACKMON, attorney for Petitioner, General GMC Trucks, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of October, 1977, I served three true copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Georgia upon the respondents and all parties, by depositing in a United States mailbox true copies of said petition, with first-class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

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Respectfully,

John A. Blackmon

JOHN A. BLACKMON
Attorney for the Petitioner

APPENDIX

APPENDIX A

In the Supreme Court of Georgia Decided: June 23,

32251. GENERAL GMC TRUCKS, INC. v.
GENERAL MOTORS CORPORATION,
GMC TRUCK AND COACH DIVISION
32252. GENERAL GMC TRUCKS, INC. v.
TRADE CITY GMC, INC.

UNDERCOFLER, Presiding Justice.

These suits involve the Motor Vehicle Franchise Practices Act of 1974, Ga. L. 1974, p. 134, Code Ann. §84-66, and the Motor Vehicle Farm Machinery Practices Act of 1976, Ga. L. 1976, p. 1440, Code Ann. §84-66 (Supp. 1976). The 1976 Act states the 1974 Act is repealed.

Among other things both of these Acts require a state license before engaging in business as a manufacturer's franchised truck dealer. Whether the license should be issued is determined by a commission established by the Acts.[1]

This litigation arose when General Motors Corpora-

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[1] The 1974 Act denominated the commission as the Motor Vehicle Commission. Under the 1976 Act it is named the Motor Vehicle Franchise Practices Commission. The 1976 Act provides, "the initial appointments of members to the commission shall be made from the persons who constituted the commission in existence at the effective date of this Chapter." Code Ann. §84-6604 (a) (Supp. 1976).

tion franchised Trade City GMC, Inc., to sell "series 9500" heavy duty trucks. Trade City is located in Cobb County and previously had been franchised to sell other types of motor vehicles. General GMC Trucks, Inc., objected to the issuance of a license to Trade City to sell heavy duty trucks. General GMC Trucks is located in Fulton County. The franchised territory for heavy duty trucks for both dealers was substantially the same.

General GMC Trucks filed its objection in 1975. Before the commission entered its order the 1974 Act was repealed by the 1976 Act. Thereafter the commission concluded that the 1976 was a substantial re-enactment of the 1974 Act and that in fact the 1974 Act was not repealed. On the merits the commission denied Trade City a license under the provisions of both Acts. Upon appeal the superior court reversed and held certain portions of the 1976 Act unconstitutional. This appeal followed. At the outset we point out that the constitutionality of the entire 1976 Act is not in issue in this appeal but only Code Ann. §84-6604(a) (Supp. 1976) dealing with the composition of the commission and Code Ann. §84-6610(f)(10) (Supp. 1976) providing certain requirements for the issuance of a franchise dealer's license.

1. *Was the 1974 Act repealed?* The superior court held the 1974 Act was repealed by the 1976 Act and reversed the Commission's finding to the contrary. We affirm. Without belaboring the issue our review of the two Acts convinces us that the 1976 Act is not such a substantial re-enactment of the 1974 Act so that it is not effectively repealed. The 1976 Act states it comprehensively revises the motor vehicle dealer fran-

chises law and specifically repeals the 1974 Act. In our opinion it did just that. General GMC Trucks' right to challenge the issuance of a license under the 1974 Act has been extinguished. Furthermore, we can not conceive what vested rights an objector acquires under a licensing statute but we are satisfied that General GMC Trucks has none here. We do, however, recognize that its challenge under the 1976 Act before issuance of a license to Trade City was timely under the circumstances.

2. *Is the composition of the Georgia Franchise Practices Commission unconstitutional?* The trial court held that the commission membership as prescribed by the 1976 Act (Code Ann. §84-6604(a) (Supp. 1976) violates due process because it is not a fair and impartial tribunal. The commission is composed of nine members, five of whom must be franchised dealers. The trial court apparently reasoned that the commission must necessarily be prejudiced in favor of franchised dealers because franchised dealers comprise a majority of the commission. We do not agree and reverse this ruling of the trial court.

The mere fact that a majority of the commission members are franchised dealers is not in itself dispositive of the issue. It is a common and acceptable practice to appoint members of a profession, business or trade to oversee the practices of that group. See generally Title 84. Members of a commission are presumed to be fair and impartial. Withrow v. Larkin, 421 U.S. 35 (95 SC 1456) (1976); United States v. Morgan, 313 U.S. 409 (SC) (1940). General Motors Corporation and Trade City have failed to overcome that presumption. Therefore, we conclude that the trial

court erred in holding that the commission was per se[2] unconstitutional. In so ruling, we are not unmindful of Wall v. American Optometric Association, Inc., 379 F. Supp. 175 (ND Ga. 1974) (3 judge court), aff'd mem. sub. nom. Wall v. Hardwick, 419 U.S. 888 (SC) (1974), urged by Trade City and General Motors Corporation. We, however, find that case distinguishable on its facts[3] and thus inapposite here.

3. *Does the 1976 Act burden interstate commerce?* The trial court held that Code Ann. §84-6610(f)(10) (Supp. 1976) was unconstitutional under the commerce clause of the U. S. Constitution. We agree. That section provides that the commission may deny a license as a franchised dealer if the manufacturer, "has evidenced his intent to grant an additional franchise for any line-make of motor vehirle, construction equipment or farm machinery, in any community or territory where a franchised dealer of the same line-make of motor vehicle, construction equipment or farm machinery is complying with the terms of his franchise or selling agreement unless the manufacturer, distributor, wholesaler, or their branches or representatives can demonstrate that such franchised dealer is not providing adequate representation in the community or territory

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2 Rule 215-4-.02 (5) of the Official Rules and Regulations of the State of Georgia provides for the Chairman of the Commission to call for any objections to individual commissioners immediately after the calling of the case, and for the waiver of such a claim if no objection is made.

3 In Wall, supra, the board, composed of members of one group, was trying to oust one third of the profession by regulating the other, nonmember group, out of business, and thereby directly benefitting the board and its group. See Gibson v. Berryhill, 411 U. S. 546 (SC) (1973).

or that the addition of another dealer can be accomplished without causing a reduction in the business of the existing dealer. . . ."

It is axiomatic that a state may not regulate interstate commerce even in the absence of federal legislation unless Congress so consents. Bowman v. Chicago and Northwestern Railway Co., 125 U. S. 465 (SC) (1887). The practical effect of this section of the 1976 Act is a limitation on the number of dealers to which General Motors may market its cars for retail sales and thereby creates an undue burden on interstate commerce. U. S. Constitution, Art. I, §8.

There can be no question but that the regulation limiting the available market for General Motors products imposes a burden on interstate commerce. See Eg. Milk Control Board v. Eisenberg, 306 U. S. 346 (SC) (1938); General Motors Corp. v. Blevins, 144 F. Supp. 381 (D. Colo., 1956) (3 judge court). However, it is equally clear that "where the state regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U. S. 137, 142 (SC) (1970).

The state may regulate under the police power where the health, safety and welfare of its citizens are at stake. The United States Supreme Court has recognized the "broad power in the State to protect its inhabitants against perils to health and safety, fradulent traders and highway hazards, even by use of measures which bear adversely upon interstate commerce." Hood &

Sons v. Dumond, 336 U. S. 525, 531-32 (SC) (1949).

The courts of Georgia, however, though broadly construing the police power, have traditionally limited the power of the state to regulate private business. For example in *Grayson-Robinson Stores, Inc. v. Oneida Ltd.*, 209 Ga. 613 (75 SE2d 161) (1953), the Georgia Fair Trade Act, Ga. L. 1937, p. 800, was held to violate the supremacy and commerce clauses as well as due process. A later fair trade act, Ga. L. 1953, p. 549 (Nov.-Dec. Sess.), was also invalidated in *Cox v. General Electric Corp.*, 211 Ga. 286 (85 SE2d 514) (1955). The state's attempt to fix milk prices through a Milk Control Board, under the Milk Control Act, Ga. L. 1937, p. 247; Ga. L. 1952, p. 55, was struck down under the due process clause as restricting the freedom to contract. *Ward v. Big Apple Super Markets, Inc.*, 223 Ga. 756 (158 SE2d 396) (1967); *Harris v. Duncan*, 208 Ga. 561 (67 SE2d 692) (1951). Similarly, the Unfair Cigarette Sales Act, Ga. L. 1949, p. 695, in *Williams v. Hirsch*, 211 Ga. 534 (87 SE2d 70) (1955), was held unconstitutional. Compare, *City of Calhoun v. North Georgia Electric Membership Corp.*, 233 Ga. 759 (213 SE2d 596) (1975) (electric membership); *Wilder v. State*, 232 Ga. 404 (207 SE2d 38) (1974) (billiards); *Holcomb v. Johnston*, 213 Ga. 249 (98 SE2d 561) (1957) (dental appliances); *Lamons v. Yarbrough*, 206 Ga. 50 (55 SE2d 551) (1949) (dental hygienists), where the regulations have been upheld as affecting the public interest and thus proper subjects of legislation under the police power.

The section of the Automobile Franchise Practices Act called into constitutional question (Code Ann. §84-6610(f)(10) (Supp. 1976)) permits the Franchise Practices Commission to deny, suspend or revoke a

license where a manufacturer seeks to grant another franchise in the same community or territory as an existing dealer, who is in compliance with his franchise, unless the manufacturer can show that the dealer is not providing adequate representation or that a new dealer can be added without reducing the existing dealer's business. We view this legislation, like that struck down in the cases set out above, as purely anticompetitive and thus not 'affected with the public interest' and within the police power of the state. Hood & Sons v. Dumond, supra. The legislature may not use its power to protect a special group from competition. See Buck v. Kuykendall, 267 U. S. 307 (SC) (1924). Accord, 16 AmJur2d Constitutional Law, §321.

The public purpose to be served is stated in the Act at Code Ann. §84-6602 (Supp. 1976) (emphasis supplied): "... the distribution and sales of motor vehicles ... *vitally affects the general economy* of the State and the public interest in the public welfare, and the General Assembly finds in the exercise of its police power, that it is necessary to regulate and to license persons who manufacture, distribute and sell motor vehicles,... so as to adequately (sic) assure a sound system of distribution of motor vehicles... to the public so as to promote the public health, safety and welfare." We are not, however, bound by the statements of public purpose found in the acts of the legislature. "We do not think that the recitals contained in the act amount to finding of fact, but are simply arguments presented by the General Assembly as to the reasons why they [sic] considered the act necessary, and their conclusions as to the effect ofthe act." *Cox v. General Electric Co.*, supra, pp. 290-91. It is the role of the judiciary to

decide if the legislature has in fact acted within its power. We conclude here, it has not.

The section of the statute here under constitutional attack very clearly burdens interstate commerce for it directly affects an out of state manufacturer seeking to market its products in Georgia. In Highland Farms Dairy, Inc. v. Agnew, 300 U. S. 608 (SC) (1936), the state of Virginia forced a Virginia milk retailer to acquire a license and sell milk at the regulated prices, but did not seek any sanctions against the retailer's out of state distributor, a Washington, D.C., company. The Supreme Court held that the state could regulate the intrastate retail sale of milk but properly refrained from attempting to regulate the interstate transaction. We think the same reasoning is applicable here. Assuming *arguendo* that Georgia could regulate the dealers in the state, it could not control transactions involving out of state manufacturers and local dealers. Here Georgia seeks to sanction the out of state manufacturer, which it cannot do.

The reasoning of the Nebraska Supreme Court accurately summarizes our view. "It is clear that the state cannot prohibit the ordinary business of buying and selling new or used motor vehicles. It may, however, regulate a business to promote the health, safety, morals or general welfare of the public. It may also regulate a business, however honest in itself, if it may become a medium of fraud. The state may, to some extent, compel honesty by imposing a license fee, if widespread frauds upon and losses by its people are thereby prevented. The liberty guaranteed to us by the Constitution implies the absence of arbitrary restraint, not immunity from reasonable regulations and pro-

hibitions imposed in the interests of the community. Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 31 SC 259, 55 LE 328.

. . . .

"We conclude that the legislature has the authority under the police power to regulate the purchase and sale of motor vehicles for the protection and general welfare of the public.

"But the legislature, under the guise of regulation, may not indulge in arbitrary price fixing, the destruction of lawful competition, or the creation of trade restraints tending to establish a monopoly." Nelsen v. Tilley, 289 N.W. 388 (126 ALR 729, 734-35) (Neb., 1939). Accord, Ohio Motor Vehicle Dealer's and Salesmen's Licensing Board v. Memphis Auto Sales, 142 NE2d 268 (Ohio, 1957); Joyner v. Centre Motor Co., Inc., 66 SE2d 469 (Va. 1951).

As stated in Dumbauld, The Constitution of the United States, 1964, at p. 126, "According to Chief Justice Taney, a state's police power is unlimited in its nature; it is simply the sovereign power to govern men and things within the jurisdiction of a state. Insofar as the constitutional prohibition forbidding deprivation of liberty or property without due process of law is concerned, the police power is indeed extensive and indefinite in its scope. In particular, it may be exercised to promote the economic welfare of the public (or of a particular group in need of relief from hardship or distress). Thus minimum wage laws and price-fixing legislation are now recognized as valid from the standpoint of due process.

"But a sharp distinction must be drawn when the validity of measures enacted by virtue of the police power is being considered under the commerce clause. For purposes of the commerce clause, genuine health, safety, or other scientifically justifiable regulations are legitimate, and the Court will regard their effect upon interstate commerce as remote or incidental. But measures that are only ostensibly related to such objectives, and that really are designed to promote the economic welfare or financial advantage of particular groups or individuals, will be held unconstitutional. This is because such economic legislation in fact amount to a regulation of commerce, and with respect to interstate commerce the Constitution has conferred upon the federal government, and not the states, the power to make decisions and determine policy with regard to such matters."

"If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Assn., 336 U. S. 460, 464 (SC) (1949).

4. Because of our rulings in divisions 1 through 3, supra, we need not reach the antitrust challenge to Code Ann. §84-6610(f)(10) (Supp. 1976) or enumeration of error 7. The trial court properly granted the motions to dismiss.

Judgment affirmed in part and reversed in part. All the Justices concur, except Hall, J. who concurs in the judgment and Hill, J. who is disqualified.

APPENDIX B

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GENERAL MOTORS CORPORATION, GMC TRUCK AND COACH DIVISION, Appellant, v. GENERAL GMC TRUCKS, INC., Appellee.	CIVIL ACTION FILE NO. C-17994

ORDER

This is an appeal by General Motors Corporation, GMC Truck and Coach Division ("GMC Truck and Coach"), pursuant to the Georgia Administrative Procedure Act, Ga. Code §3A-120, from an order issued by the Georgia Franchise Practices Commission on May 27, 1976 invalidating a franchise agreement made on October 9, 1975 between GMC Truck and Coach and Trade City GMC, Inc. ("Trade City") for the sale of 9500 series heavy-duty trucks manufactured by GMC Truck and Coach.

I.

The Commission issued this order under authority of the Georgia Motor Vehicle Franchise Practices Act of 1974, Ga. Laws 1974, p. 134 *et seq.* (repealed 1976)

(the "1974 Act") and the Georgia Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act of 1976, Ga. Code §84-6601 *et seq.* (Ga. Laws 1976, p. 1440 *et seq.*) (the "1976 Act"), both of which provide for comprehensive regulation by a Commission of relations between manufacturers and their franchised dealers within Georgia. Section 84-6610(f)(10) of the 1976 Act (Ga. Laws 1976, p. 1452) provides that the Commission may deny an application for a license or censure, suspend or revoke a license after it has been granted where a manufacturer, factory branch, distributor or wholesaler:

> "[H]as evidenced his intent to grant an additional franchise for any line-make of motor vehicle... in any community or territory where a franchised dealer of the same line-make of motor vehicle... is complying with the terms of his franchise or selling agreement unless the manufacturer... can demonstrate that such franchised dealer is not providing adequate representation in the community or territory or that the addition of another dealer can be accomplished without a reduction in the business of the existing dealer."

The proceedings below began on September 27, 1975 when General GMC Trucks, Inc. ("General GMC"), appellee here, filed a petition with the Georgia Motor Vehicle Commission under the 1974 Act. The petition filed by General GMC sought to invalidate the franchise agreement between GMC Truck and Coach and Trade City for the 9500 series heavy-duty truck. Defensive responses were filed by GMC Truck and Coach, including Motions to Dismiss based upon constitutional objections to the 1974 Act. General GMC filed a motion

to strike certain portions of the motion to dismiss filed by GMC Truck and Coach.

A hearing was held before the Motor Vehicle Commission on February 24-25, 1976, and extensive evidence was presented. The Motor Vehicle Commission took GMC Truck and Coach's Motions to Dismiss under advisement, and reserved judgment on the other issues presented at the hearing.

Prior to any decision by the Motor Vehicle Commission on any issue in the proceeding, the General Assembly on April 1, 1976 repealed the 1974 Act "in its entirety", and enacted the 1976 Act. After the passage of the 1976 Act and prior to a ruling by the new Commission created by the 1976 Act, GMC Truck and Coach filed additional Motions to Dismiss based on constitutional objections similar to those earlier raised against the 1974 Act, and General GMC amended its petition.

On May 27, 1976, the Commission issued its order, which invalidated the franchise between GMC Truck and Coach and Trade City for the 9500 series heavy-duty franchise and which also over-ruled GMC Truck and Coach's Motions to Dismiss. GMC Truck and Coach appeals from this order.

II.

While this appeal raises numerous issues, the most serious issues are GMC Truck and Coach's attacks on the constitutionality of pertinent provisions of the 1976 Act. After hearing argument of counsel and reviewing the briefs submitted by both parties in this matter, the

Court has become persuaded that two sections of the 1976 Act are unconstitutional, essentially for the reasons set forth in the brief submitted by GMC Truck and Coach. Section 84-6604(a) (Ga. Laws 1976, pp. 1444-45) unconstitutionally denies due process of law, and §84-6610(f)(10) (Ga. Laws 1976, p. 1452) is unconstitutional because it conflicts with the federal antitrust laws and also because it creates an undue burden on interstate commerce.

Section 84-6604(a) (Ga. Laws 1976, p. 1444-45) is unconstitutional both on its face and as applied under the due process clauses of the Georgia Constitution and the United States Constitution because the Commission that is created by that section is not fair and impartial. Ga. Const. Art. I, §1, ¶3; U.S. Const. Am. 14, §1. In *Wall v. The American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D. Ga. 1974) *aff'd mem. sub nom. Hardwick v. Wall*, 419 U.S. 888 (1974) *reh. den.* 419 U.S. 1019, the Court stated:

> "It is one of the mainstays of our system of laws that a state cannot affect a person's personal or property rights except after a hearing before a fair and impartial tribunal. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). *In re Murchison*, 349 U.S. 133, 75 S. Ct. 623, 99 L.Ed. 942 (1955); *Berger v. United States*, 255 U.S. 22, 41 S.Ct. 230, 65 L.Ed. 481 (1921). A fair and impartial tribunal requires at least that the trier of fact be disinterested. *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 739 (1927), and that he also be free from any form of bias or predisposition regarding the outcome of the case, *Pillsbury Co. v. FTC*, 354 F.2d 952 (5th Cir. 1966); *N.L.R.B. v. Phelps*, 136 F.2d 562 (5th Cir. 1943). Not only must the procedures be fair, 'the very

> appearance of complete fairness' must also be present. *Amos Treat & Co. v. SEC*, 113 U.S. App. D.C. 100, 306 F.2d 260, 267 (1962). These principles apply not only to trials, but equally if not more so, to administrative proceedings. *Ohio Bell Telephone Company v. Public Utilities Com'n.*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); *N.L.R.B. v. Phelps, supra, Jaffe and Nathanson, Administrative Law*, 34d Ed. (1968), 955 et seq."

379 F.Supp. at 188.

Section 84-6604(a) (Ga. Laws 1976, pp. 1444-45) provides that the Commission shall have nine members, five of whom must be "franchised dealers", as that phrase is defined in §84-6603(d) (Ga. Laws 1976, p. 1442). The Commission, composed in this fashion, is neither disinterested, nor fair and impartial. The members of the Commission represent the class of existing dealers in Georgia, all of whom have a natural interest in excluding additional competition. Thus the due process requirement of a fair and impartial tribunal is not satisfied in this case.

Section 84-6610(f)(10) (Ga. Laws 1976, p. 1452) restrains trade in conflict with the federal antitrust laws, 15 U.S.C. §1 and 2 *et seq.* because it restrains the entry of additional dealer competition into an existing dealer's "community or territory." It is clear that such an anti-competitive result is contrary to the policy established by the antitrust laws and to the usual policy of the State of Georgia with respect to restraints on trade *United States* v. *Topco Associates*, 405 U.S. 596, 606, 608 (1972); *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 531 F.2d 1230 (3rd Cir. 1975). Therefore, §84-6610(f)(10) (Ga. Laws 1976, p. 1452) is unconstitutional on its face and as applied under the

Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, §2.

Section 84-6610(f)(10) (Ga. Laws 1976, p. 1452) also creates an undue burden on interstate commerce and therefore is invalid on its face and as applied under the Commerce Clause of the United States Constitution. U.S. Const. Art. I, §8, cl. 2. State regulations that are designed to protect only local economic interests without a legitimate public purpose are impermissible under the Commerce Clause. Section 84-6610(f)(10) (Ga. Laws 1976, p. 1452) restricts the number of dealerships within the State of Georgia and also restricts the availability of spare parts and repair services within Georgia, without any legitimate public purpose. *H. P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525 (1948); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964).

III

The Court is concerned that the Commission adjudicated GMC Truck and Coach's rights under the 1974 Act, which was repealed "in its entirety" by the 1976 Act prior to the date the Commission issued the order. General GMC points out correctly that where a new Act "reenacts substantially the provisions of the earlier statute," a true repeal has not been effected. *See Lanham & Son Co.* v. *City of Rowe*, 136 Ga. 378, 403 (1911); *Gunby* v. *Harper*, 216 Ga. 94 (1960). However, it appears to the Court that the 1976 Act was intended as a complete rewriting of the 1974 Act; and, in addition, it undertook to add numerous refinements and substantial changes or additions. Hence, the Court feels that the Commission acted improperly in adjudi-

cating GMC Truck and Coach's rights under the 1974 Act.

In light of the Court's holding that §§84-6604(a) (Ga. Laws. 1976, pp. 1444-45) and 84-6610(f)(10) (Ga. Laws 1976, p. 1452) are unconstitutional, it is not necessary to reach either the other constitutional objections against the 1976 Act raised below by GMC Truck and Coach's Motions to Dismiss, or the question whether the Commission's order is supported by any evidence.

IV.

For the reasons stated above, it is hereby ORDERED:

That the order of the Georgia Franchise Practices Commission in this matter dated May 27, 1976 prejudices substantial rights of General Motors Corporation, GMC Truck and Coach Division in violation of constitutional provisions and therefore the order is reversed and vacated. The Motions to Dismiss filed below by General Motors Corporation, GMC Truck and Coach Division are granted. The Georgia Franchise Practices Commission is permanently enjoined from taking any action or issuing any order in this matter under authority of the Georgia Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act of 1976, Ga. Code §84-6601 *et seq.* (Ga. Laws. 1976, p. 1440 *et seq.*)

Fulton County, Georgia
Dated: Dec. 8, 1976

JACK ETHERIDGE
Judge of the Superior Court,
Atlanta Judicial Circuit

APPENDIX C

GENERAL GMC TRUCKS, INC., *Petitioner/Complainant* V. GENERAL MOTORS CORPORATION; GENERAL MOTORS CORPORATION, TRUCK AND COACH DIVISION; and TRADE CITY GMC, INC., *Respondents*	BEFORE THE GEORGIA FRANCHISE PRACTICES COMMISSION

ORDER

The above-styled matter, having come on for hearing on February 24 and 25, 1976, and the parties hereto having presented evidence and arguments on the issues raised, the Georgia Franchise Practices Commission herewith issues this, its opinion and order.

SUMMARY OF THE EVIDENCE

General GMC Trucks, Inc., hereinafter referred to as the complainant, filed a complaint with the then Georgia Motor Vehicle Commission, alleging that the respondents General Motors Corporation and General Motors Corporation, Truck and Coach Division, hereinafter collectively referred to as General Motors

Corporation, intended to grant an additional franchise for a particular line-make of motor vehicle in the community or territory where the complainant, a dealer franchised by the General Motors Corporation, was complying with its franchise and was providing adequate representation for General Motors Corporation. The respondent Trade City GMC, Inc. was to be the recipient of the new franchise. The franchise would authorize the purchase and sale of a type of heavy duty truck, identified throughout the industry as the "9500 series" heavy duty truck.

In response to the complaint and the notice of hearing entered thereon, a motion to dismiss was filed with the Commission. The motion to dismiss represented both a wholesale attack upon the statute alleging ten separate grounds for holding the statute invalid and an attack on the validity of ten specific sections of the act in addition to the rules of the Commission which allow limited discovery by the parties.

The complainant responded with a motion of its own, asking the Commission to strike certain portions of the respondents' motion to dismiss.

The Commission, taking the motions under advisement, set the matter down for hearing, and on February 24 and 25, 1976, a hearing was held by the Commission. Since it was admitted that General Motors Corporation intended to grant an additional heavy duty truck franchise to Trade City GMC, Inc., which would authorize the purchase and sale of the "9500 series" truck by Trade City GMC, Inc., the issues were limited, without considering the motions, to the following:

(1) Did General Motors Corporation grant an additional heavy duty truck franchise, which would authorize the sale and service of the "9500 series" truck, to a dealer who was located in the community or territory of the complainant, General GMC Trucks, Inc.; and

(2) If such a franchise were granted in the community or territory of the complainant, was the complainant complying with its franchise or selling agreement and was the complainant providing adequate representation for the General Motors Corporation in its community or territory.

With respect to the first issue, the complainant introduced a document identified as the ""GMC" Heavy Duty Truck Dealer Sales and Service Agreement" held by the complainant. That document designated a particular area as the complainant's primary area of responsibility and included, in the State of Georgia, the counties of Clayton, Cobb, DeKalb, Douglas, Fulton, Coweta, Hall, Fayette, Forsyth, Gwinnett, Henry, Rockdale, Spaulding, Paulding, Harrelson, Carroll, Heard, Polk, Floyd, Bartow, Cherokee, Pickens, Dawson, Lumpkin, Barrow, Jackson, Madison, Hart, Franklin, Banks, White, Habersham, Chattooga, Morgan, Walton, Newton and Oconee. While the parties could not agree that this area comprised the community or territory of the complainant, the evidence did indicate that the respondents expected the complainant to sell their products in this area, the complainant was to advertise in this area, the complainant

was to send its salesmen into this area and, when reviewing the complainant's performance, General Motors Corporation considered the primary area of responsibility in making evaluations of the complainant.

The evidence further demonstrated that under the franchise agreement both the complainant and the respondent Trade City GMC, Inc. had the identical primary area of responsibility.

With respect to the second issue, General Motors Corporation did not attempt to assert that the complainant was not complying with the franchise agreement, or more particularly, General Motors Corporation did not present any evidence which demonstrated any particular part of the franchise agreement to which the complainant was not adhering. The bulk of the testimony was oriented towards the question of whether the complainant was providing adequate representation in its community or territory.

The basic tact taken by the respondents was a two-pronged approach to the adequacy of the representation. Initially, the respondents looked solely at Cobb County and the number of registrations of the "9500 series-type" trucks in that county. The respondents compared the industry-wide registrations with the GMC truck registrations and attempted to show that the percentage of the market which the respondents' products was receiving was exceedingly low.

The second approach involved a division of the sales of the respondents' products into fleet and non-fleet sales, fleet sales being defined as sales to persons who had purchased 10 or more units the preceding year. Re-

spondents attempted to show that, industry-wide, the sales of GMC products in the non-fleet area tracked very closely with other manufacturers, while in the Atlanta area, the percentage of non-fleet business involving GM products was only one-third to one-half of the percentage of the other manufacturers' non-fleet business.

Thus, the respondents, in an attempt to show inadequate representation by the complainant, rested its argument on the fact that General Motors Corporation's products received an inordinantly low percentage of registrations in Cobb County as opposed to the industry, and that in the Atlanta area, the respondents were under-represented in the non-fleet sales of its products.

The statistical information was derived from the testimony of Carl R. Pretty, who was the administrator for trucks and motor homes in the dealer organization department of the General Motors Corporation sales section. He testified that the data with respect to the county registrations was obtained from the R. L. Polk Company as well as from information supplied by General Motors Corporation divisional personnel who were employed in this area.

Mr. Pretty testified that, with respect to the sale of General Motors Corporation's products, the nation is broken into zones and districts. The Atlanta zone is comprised of Georgia, Florida, parts of Tennessee and parts of Alabama. Mr. Pretty testified that General Motors Corporation's national percentage of the market in terms of the sales of the "9500 series" truck was ten percent, and the average in the zone in which the

complainant is found was thirteen and one-half percent. That is, the testimony indicated that of all trucks sold in the "9500 series", whether made by General Motors Corporation or by some other manufacturer, General Motors Corporation, on a national level, obtained about ten percent of all sales, and in the zone in which complainant is found, General Motors Corporation obtained thirteen and one-half percent of the sales.

Further evidence provided at the hearing by the respondents indicated that in the thirty-seven county area which represents the complainant's primary area of responsibility, General Motors Corporation's products accounted for 16.5 percent of all registrations and in Cobb County, the percentage of GMC products registered was 2.7%. These figures were offered on a three-year average covering 1972 through 1974.

However, the figures adduced left something to be desired insofar as they purported to fairly demonstrate the complanant's performance. First, the figures obtained were based on the registration of the vehicles, which is done on a county-by-county basis, and the figures did not reflect the issue of whether the complainant had any opportunity to sell the products involved. That is, the testimony of Mr. Sinclair concerning the figures brought two salient facts to light. First, some of the trucks registered in Cobb County were purchased out of the State of Georgia and thus should not be included in the figures which are used to determine whether the complainant was doing an adequate job of representing General Motors Corporation in comparison to the sale of the "9500 series" truck in this area.

Second, there was testimony to the effect that there was one company that purchases a large number of vehicles in the Cobb County area and that this company refused to buy General Motors Corporation's products, although the prospective purchaser had in fact bought the same series truck from another manufacturer and had purchased these vehicles through the complainant, who has multiple franchises in the "9500 series" truck. Thus, the evidence presented by the respondents with respect to the Cobb County registrations is not necessarily indicative of the complainant's true performance in Cobb County. In fact, after adjusting the figures for sales registered in Cobb County by removing those sales which were made by out-of-state concerns and by removing those sales to the purchaser referred to above, the statistics reflect, at least superficially, that General Motors Corporation products accounted for approximately 5.3% of the registrations in Cobb County for the three-year period 1972 through 1974. While this figure does not approach the national average, it does demonstrate that these figures can be manipulated and, because they are based on registrations, are somewhat suspect.

The second issue is of even more concern and that involves respondents' assertions that they are not being adequately represented because its percentage of non-fleet sales in the Atlanta-defined area, trails woefully behind in the industry average of non-fleet sales. That is, where on an industry-wide scale, non-fleet sales in the Atlanta area represent approximately 20% of all sales, non-fleet sales of General Motors Corporation products is only one-third to one-half of that figure. Again, this figure causes some concern as can be demonstrated by looking at Exhibit B-1 and more par-

ticularly, by examining the figures under the titles "Atlanta GM-Defined Area Only", where the lag is allegedly demonstrated. In the year 1974, when considering the industry-wide registration of a group of trucks which includes the "9500 series", 18.6% of all registrations were by non-fleet purchasers. On the other hand, in 1974, using the same category, only 9.4% of the registration of General Motors Corporation products were in the non-fleet area. Thus, the respondents attempt to show that they are being inadequately represented in the non-fleet business.

However, nothing in the franchise agreement or in any other evidence brought forth at the hearing, indicates that the division between fleet and non-fleet sales has any real meaning or importance outside of the context of this hearing.

The more appealing figure, and it is only appealing because it was compiled by the respondents and if there are any weaknesses or inadequacies in the compilations, they must lie most heavily on the respondents, is the percentage of registrations of General Motors Corporation products in the primary area of responsibility which has been assigned to complainant. The figures provided by the respondents demonstrate that during the period beginning 1972 and concluding in 1974, in the 37-county area identified as the primary area of responsibility of the respondents, registrations of General Motors products in the "9500 series" comprised 16.5% of all registrations, well above the national average of 10% and well above the zone average of 13.5%. As broken down further, Exhibit C-2 shows General Motors Corporation's share of the market in Clayton, DeKalb and Fulton Counties comprised 22.1%

of the registrations, and their share of the market in the remaining 34-county area comprising the complainant's primary area of responsibility was 4.3%. However, this latter figure is a bit misleading as the testimony of Mr. Pretty indicated. Mr. Pretty indicated that while compiling these figures, he noticed that Bartow County appeared to have a large number of GMC products registered there and discovered that for some reason a corporation headquartered in Fulton County had registered 81 units in Bartow County. Mr. Pretty removed these units from the Bartow County figures and placed them with the Fulton County figures. When these units are returned to the county in which they were originally registered, the figures change significantly. That is, in the three counties of Clayton, DeKalb and Fulton counties the market showed General Motors Corporation products is reduced to 17.2%, which is still well above the zone and national average, but, more significally, the percentage of sales in the remaining 35-county area of General Motors Corporation's products rises to 13.8%, a figure which also exceeds both the zone and national average.

Thus, if an overall view of the entire primary area of responsibility is taken, it is evident that the complainant has provided the respondents with a larger share of the market in its primary area of responsibility, than is achieved either on the national level or in the zone in which the complainant is found. It is only when the respondents attempt to break the market into separate isolated segments, that it appears that any underrepresentation may exist.

In addition to the evidence and testimony presented,

certain stipulations and other evidence was offered by the parties. Included in the evidence offered was a list of the names and occupations as well as other pertinent data concerning the members of the Commission. While the Commission members are certainly cognizant of this information, because of the nature of the motion to dismiss filed by the respondents, the Commission deemed it necessary that this information be included in the record. It was therefore admitted.

After the hearing had been concluded, and on May 3, 1975, the respondents submitted a second motion to dismiss. This was necessitated by the fact that on April 1, 1975, Senate Bill 594 had been signed into law by the Governor of the State of Georgia (Act No. 1373, Ga. Laws 1976, p. —). This law purported to repeal Ga. Laws 1974, p. 134 (Ga. Code Ann. Chap. 84-66), on which the complainant's original complaint had been based. The complainant had previously filed an amended complaint incorporating the provisions of the new law.

The respondents essentially reasserted the grounds for dismissal which they had alleged in their original motion to dismiss, deleting those areas and charges which had been corrected or deleted by Act 1373, approved April 1, 1976. They still complained the Commission was unconstitutionally formed because a majority of its members were dealers; that the law was unconstitutional because it prevented manufacturers from establishing additional dealerships in a community or territory served by an existing dealer, thus restraining the manufacturer's pursuit of a lawful private business; that the law restrained trade in violation of the Sherman Anti-Trust Act, 15 U.S.C.A. §§1

and 2; that the new law, which was only applicable to manufacturers of new motor vehicles, new construction equipment and new farm machinery, created a discriminatory classification in violation of the Equal Protection Clauses of the Georgia and United States Constitution, that the new law was unconstitutional because it impaired existing contracts; that the law was unconstitutional because it placed the burden of proof on the manufacturer to demonstrate that existing dealers were inadequately representing the manufacturers; and that the law was unconstitutional because it was vague and that it did not define certain terms or phrases were used in the Act, as well as a host of other alleged constitutional deficiencies.

Based on the evidence adduced at the hearing, including the documentary evidence as well as the testimony, the Commission has reached the following:

FINDINGS OF FACT

1.

General GMC Trucks, Inc. the complainant, is a licensed motor vehicle dealer in the State of Georgia.

2.

General Motors Corporation is a licensed manufacturer in the State of Georgia.

3.

General Motors Corporation, Truck and Coach Division, is a licensed distributor in the State of Georgia.

4.

Trade City GMC, Inc. is a licensed dealer in the State of Georgia.

5.

There exists a particular series of heavy duty truck, which all parties in this action recognize and identify by the nomenclature "9500 series" heavy duty truck.

6.

Complainant General GMC Trucks, Inc., is authorized by General Motors Corporation to purchase and sell GMC's version of the "9500 series" truck.

7.

On October 9, 1975, General Motors Corporation also authorized Trade City GMC, Inc. to purchase and sell the "9500 series" truck which is located approximately 21 miles from the location of General GMC Trucks, Inc.

8.

General GMC Trucks, Inc. has a franchise agreement with General Motors Corporation which authorizes it to sell the "9500 series" truck, and this franchise agreement contains a specific area which is designated as the primary area of responsibility of General GMC Trucks, Inc.

9.

That primary area of responsibility in the State of Georgia includes the counties of Clayton, Cobb, DeKalb, Douglas, Fulton, Coweta, Hall, Fayette, Forsyth, Gwinnett, Henry, Rockdale, Spaulding, Paulding, Harrelson, Carroll, Heard, Polk, Floyd, Bartow, Cherokee, Pickens, Dawson, Lumpkin, Barrow, Jackson, Madison, Hart, Franklin, Banks, White, Habersham, Chattooga, Morgan, Walton, Newton and Oconee.

10.

In this primary area of responsibility, General GMC Trucks, Inc. is expected to sell trucks, to advertise for the sale of trucks, to send salesmen to find prospective purchasers and, when evaluations of the performance of General GMC Trucks, Inc. are conducted, their performance in this geographical area is reviewed.

11.

The service facilities of General GMC Trucks, Inc. as well as the number of personnel hired are conditioned upon providing service in this primary area of responsibility.

12.

More particularly, General GMC Trucks, Inc., conducts an active sales business in the entire metropolitan Atlanta area, which includes, among other counties, Cobb County.

13.

The franchise agreement which exists between General GMC Trucks, Inc. and General Motors Corporation does not distinguish between fleet sales and non-fleet sales and no requirements exists which requires the franchisee to devote any particular portion of its effort to either fleet or non-fleet sales.

14.

General Motors Corporation conducts its business, and particularly its evaluation of the success of its business, both at the national level as well as the zones. The Atlanta zone consists of Georgia, Florida, most of Tennessee and a part of Alabama.

15.

On the national level, General Motors Corporation's share of the market for the "9500 series" truck average is 10%.

16.

In the Atlanta zone, General Motors Corporation's share of the industry-wide market for the "9500 series" truck averages 13.5%.

17.

Neither of the averages cited in the preceding two paragraphs is broken down by fleet and non-fleet sales, but represents an overall market penetration.

18.

Penetration by registration in the particular area identified as Cobb County, falls below both the national and the zone average, averaging only 5.3% over the years 1972 through 1974.

19.

However, in the entire area of responsibility serviced by General GMC Trucks, Inc., General Motors Corporation has a total market share by truck registration of 16.5%.

20.

In the three-county area of Clayton, DeKalb and Fulton counties, General Motors Corporation has a penetration of 17.2%.

21.

In the remaining 34-county area which comprises the complainant's primary area of responsibility, the General Motors Corporation has a market share by registration of 13.8%.

CONCLUSIONS OF LAW

1.

Both of the respondents' motions to dismiss, one having been filed prior to April 1, 1976, and one filed after April 1, 1976, are predicated on questions of law and specifically ask the Commission to find that certain portions of the law violate the United States Constitution, the Constitution of the State of Georgia, and portions of the Sherman Anti-Trust Act, 15 U.S.C.A. §§1 and 2. The Commission finds, as a matter of law, that neither Ga.. Laws 1974, p. 134, *et seq.* (Ga. Code Ann. Chap. 84-66) nor Ga. Laws 1976, p. — (Senate Bill 594, Approved April 1, 1976), violates any provision of the Constitution of the United States, the Constitution of the State of Georgia or the Sherman Anti-Trust Act, 15 U.S.C.A. §§1 and 2, for any reason set forth in the respondents' motions. The respondents' motions are therefore denied.

2.

The complainant's motion to strike portions of the

respondents' motions to dismiss based on the relevancy of certain attacked portions is also denied. The challenge against the statutes attacks the very fundamental sections involved in this matter. Should the law be overturned for any reason, the Commission's existence would obviously come to an end, hence, the challenge to any section is obviously relevant.

3.

The Commission further finds, addressing the preliminary jurisdictional question, that the 1976 law, Senate Bill 594, approved April 1, 1976, is a substantial re-enactment, in the pertinent parts, the 1974 law, Ga. Laws 1974, p. 134 (Ga. Code Ann. Ch. 84-66) and the jurisdiction which vested in the former Georgia Motor Vehicle Commission, now the Georgia Franchises Practice Commission, is not divested by virtue of the enactment of the 1976 law and the subsequent repeal of the 1974 law. As a matter of law, the 1976 law has not repealed the 1974 law and the jurisdiction of the Commission over this complaint continues.

4.

With respect to jurisdiction based on the particular factual situation in the matter at bar, the Commission finds that the community or territory served by the complainant includes those counties set forth as the primary area of responsibility in the franchise agreement between the complainant and General Motors Corporation.

5.

The Commission finds as a matter of law that the respondents have not shown, as is required by the pro-

visions of Ga. Laws 1974, pp. 134,145 (Ga. Code Ann. §84-6605(a)(7)) or by the present Ga. Code §84-6610 (f)(10) that the complainant is not complying with its franchise or sales agreement or that the complainant is providing inadequate representation in its community or territory and thus the conditions which would authorize the placing of a second dealer in the community or territory of the complainant, which is defined as its primary area of responsibility have not been met. Stated conversely, under the facts presented the complainant is both complying with its franchise agreement and is producing adequate representation to the General Motors Corporation in the community or territory served by the complainant.

For the foregoing reasons, it is evident that the respondents General Motors Corporation and General Motors Corporation, Truck and Coach Division, has granted an additional franchise to purchase and sell the "9500 series" truck to Trade City GMC, Inc. in that community or territory in which General GMC Trucks, Inc. is presently a franchised dealer. The evidence clearly indicates that the complainant, General GMC Trucks, Inc., has been fulfilling its obligations under its franchise, and has been adequately representing the respondents in the community or territory assigned it.

Therefore, it is herewith ordered that the respondents General Motors Corporation and General Motors Corporation, Truck and Coach Division, are prohibited from granting or continuing any franchise agreement with Trade City GMC, Inc., which would allow Trade City GMC, Inc. to purchase or sell the "9500 series" of heavy duty trucks. Respondent Trade City GMC,

Inc. is herewith prohibited from entering into any agreement or continuing any agreement with respondents General Motors Corporation or General Motors Corporation, Truck and Coach Division, through which Trade City GMC, Inc. is authorized to purchase or sell the "9500 series" heavy duty trucks. The agreement previously entered into between these respondents on or about October 9, 1975, to the extent that it authorized Trade City GMC, Inc. to purchase and sell the "9500 series" heavy duty trucks is in violation of Ga. Code Ch. 84-66, and is of no force or effect.

The respondents are herewith given thirty (30) days within which they must either appeal this decision or evidence their intent to comply with the findings and conclusions of this Commission. If at the end of said thirty (30) days, this matter has not been appealed to the appropriate appellate court or the respondents have not evidenced their intent to comply with this decision, the Commission will entertain a motion by the complainant to impose sanctions against the licenses of the respondents.

This the 27th day of May, 1976.

Chairman,
Georgia Franchise Practices
Commission

APPENDIX "D"

SUMMARY OF STATE STATUTES WHICH PRESCRIBE CONDITIONS UNDER WHICH NEW OR ADDITIONAL FRANCHISE OUTLETS ARE PERMITTED IN THE COMMUNITY OR TERRITORY OF AN EXISTING FRANCHISE DEALER

State	*Applicable Section of State Law*
Arizona	Arizona Revised Statutes 28-1304.02
California	California Vehicle Code 3062, 3063
Colorado	Colorado Revised Statutes 13-11-20
Florida	Florida Statutes Section 320-642
Georgia (the code section in issue in this petition)	Georgia Code Section 84-6610(f) (10)
Hawaii	Hawaii Revised Statutes 437-28(a) (22) (b)
Iowa	Iowa Code Annotated Section 322A.4
Massachusetts	Annotated Laws of Massachusetts 93B Section 4(3) (1) (new act passed and awaiting the governor's signature)
Nebraska	Revised Statutes of Nebraska Section 60-1422
New Hampshire	New Hampshire Revised Statutes Annotated Section 357-B, Section 4(III) (1)
New Mexico	New Mexico Statutes Annotated Chapter 6 (Laws of 1973)

North Carolina	North Carolina General Statutes Section 20-305(5)
Rhode Island	Rhode Island Statutes Section 31-5.1-4(c)(11)
South Dakota	South Dakota Codified Laws Section 32-6A-3, 4
Tennessee	Tennessee Code Annotated Chapter 17 Section 59-1714(j)
Vermont	Vermont Statutes Annotated Title 9 Chapter 107 Section 4074(c)(9)
Virginia	Virginia Code Annotated Section 46.1-547(d)
Wisconsin	Wisconsin Statutes Annotated Section 218.01(3)(f)
West Virginia	West Virginia Code Volume 14 Section 47-17-5(i)

Source: National Automobile Dealers' Association

APPENDIX "E"

STATES (INCLUDING THE COMMONWEALTH OF PUERTO RICO) WHICH PROVIDE CERTAIN RIGHTS BY LAW TO FRANCHISE MOTOR VEHICLE DEALERS — GENERALLY INCLUDING A PROVISION WHICH PROTECTS THE FRANCHISE DEALER FROM ARBITRARY AND UNREASONABLE CANCELLATION OF HIS FRANCHISE WITHOUT DUE CAUSE. (In addition to the states listed here, those states listed on Appendix "D" also have generally comparable provisions).

State	*Applicable Section of State Law*
Arkansas	Arkansas Statutes Section 75-1501 et seq. (defeated at referendum, Nov. 6, 1962); Section 75-160 et seq. (Acts 1949, No. 142, amended 1959)
Connecticut	Connecticut General Statutes Section 14-51 et seq.
Idaho	Idaho Code Section 49-135 et seq.
Kansas	Kansas Statutes Annotated Section 8-126 et seq.
Kentucky	Kentucky Revised Statutes Section 190.010 et seq.
Maine	Revised Statutes of Maine Annotated Chapter 29, Section 1 et seq.
Maryland	Annotated Code of Maryland Article 66-1/2 Section 61 et seq.
Minnesota	Minnesota Statutes Annotated Section 168.27 et seq.

Mississippi	Mississippi Code Annotated Section 8071.3
New Jersey	New Jersey Statutes Annotated Section 39:10-1 et seq.
New York	McKinney's Consolidated Laws of New York Annotated, General Business Law Section 195 et seq., Vehicle and Traffic Law Section 415 et seq.
North Dakota	North Dakota Century Code Section 39-22-01 et seq., Section 51-07-01 et seq.
Ohio	Page's Ohio Revised Code Annotated Section 4517.01 et seq.
Oklahoma	Oklahoma Statutes Annotated Title 47 Section 22.15a, Title 47 Section 561 et seq.
Pennsylvania	Purdon's Pennsylvania Statutes Annotated Title 75 Section 409, Title 69 Section 601 et seq., Title 63 Section 801 et seq.
Commonwealth of Puerto Rico	(Citation unavailable)
South Carolina	Code of Laws of South Carolina Section 46-91 et seq.
Texas	Vernon's Texas Civil Statutes, Cities, Towns and Villages Article 1015e, State Highways Article 6686

The following states have no comparable provisions: Alabama, Alaska, Delaware, District of Columbia, Illinois, Indiana, Michigan, Missouri, Montana, Nevada, Oregon, Utah, Washington, Wyoming.

Source: "A compendium of state licensing laws regulating motor vehicle manufacturers, dealers and salesmen" of the National Automobile Dealers Association, 200 K Street, N.W., Washington, D. C. Originally published in 1968, supplemented in 1974 and other information furnished by the National Automobile Dealers Association.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-545

GENERAL GMC TRUCKS, INC.,
Petitioner,

vs.

GENERAL MOTORS CORPORATION, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR GENERAL MOTORS CORPORATION IN OPPOSITION

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OPINIONS BELOW

The opinions below are set forth correctly in the Petition (Pet. 1-2). The decision of the Supreme Court of Georgia has now been reported at 239 Ga. 373, 237 S.E. 2d 194 (1977).

JURISDICTION

The jurisdiction of this Court in this case is accurately stated in the Petition (Pet. 2).

QUESTIONS PRESENTED

(1) Whether the Supreme Court of Georgia was correct in holding that the restriction on new dealers by existing dealers for the retail sale of motor vehicles within Georgia contained in §84-6610(f)(10) of the Act creates an undue burden on interstate commerce?

(2) Whether §84-6610(f)(10) of the Act, which restricts competition between dealers within Georgia by allowing existing dealers to exclude new dealers, is in conflict with the Sherman Antitrust Act and therefore invalid under the Supremacy Clause?*

(3) Whether the Georgia Franchise Practices Commission (the "Commission"), which is required by §84-6604(a) of the Act to be composed of a majority of existing dealers, can be a fair and impartial tribunal in deciding legal and economic disputes between dealers and manufacturers consistent with fundamental due process requirements?*

STATUTES INVOLVED

Provisions Relevant to the First Question Presented:

The Commerce Clause of the United States Constitution, U. S. Const. art. I, §8, and §84-6610(f)(10) of the Georgia Motor Vehicle, Farm Machinery and Construction Equipment Franchise Practices Act of 1976, 1976 Ga. Laws 1440, Ga. Code Ann. §84-6601 (the "Act"), are accurately set forth in the Petition (Pet. 3).

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*If this Court grants the petition, then this Court should consider these issues as additional grounds for affirming (without modifying) the judgment of the Supreme Court of Georgia. *Langnes* v. *Green*, 282 U. S. 531, 539 (1931); *United States* v. *Nobles*, 422 U. S. 225, 241-42 n. 16 (1975).

Provisions Relevant to the Second Question Presented:

The Supremacy Clause of the United States Constitution provides in part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U. S. Const. art. VI, cl. 2.

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§1-7 (1974), provide in part as follows:

> §1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .
>
> §2 Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . .

Provisions Relevant to the Third Question Presented:

The Fourteenth Amendment to the United States Constitution provides in part as follows: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U. S. Const. amend. XIV, §1.

Section 84-6604(a) of the Act, 1976 Ga. Laws 1444-45, Ga. Code Ann. §84-6604(a), provides in part as follows:

> There is hereby created the Georgia Franchise Practices Commission to be composed of nine members . . . [F]ive of the members shall be franchised dealers (three of whom must be dealers who sell automobiles) who have been actively engaged in business as such in the State of Georgia for at least five years. . . Four members of the commission shall not be dealers or employees of a dealer.

STATEMENT OF THE CASE

This action began in September 1975, when Petitioner General GMC Trucks, Inc. filed an administrative complaint with the Commission seeking to invalidate the franchise contract between the GMC Truck and Coach Division of General Motors Corporation ("GMC") and Trade City GMC, Inc. ("Trade City") for the sale to Trade City of heavy-duty 9500-series trucks manufactured by GMC (RGFPC 245).[1] Trade City is an established truck dealership in competition with Petitioner. In its administrative complaint, Petitioner alleged that it held an existing franchise for the 9500-series truck, and that under §84-6610(f)(10) of the Act the Petitioner alleged that it had the right to stop GMC from granting a similar franchise for the 9500-series truck to Trade City or any other dealer in the Petitioner's "community or territory."

It should be noted that the existing franchise agreement between Petitioner and GMC was a *non-exclusive* franchise; that is, that it expressly provided that GMC could at any time establish additional dealerships to purchase and market trucks manufactured by GMC. Until 1975, Petitioner was not only franchised to purchase from

1. GMC adopts the designations of the various portions of the record used by Petitioner.

GMC and market light and medium duty trucks manufactured by GMC, but also was the only franchised GMC 9500-series truck dealer in the Atlanta metropolitan area or for a surrounding area of 75 to 100 miles of its location in Fulton County.

Trade City is an independent truck dealership in Cobb County that has had since 1967 a franchise agreement with GMC that authorizes Trade City to purchase from GMC and market light and medium duty trucks manufactured by GMC. On October 9, 1975, Trade City and GMC entered into a new franchise agreement authorizing Trade City also to purchase from GMC and to market the full line of trucks manufactured by GMC, including the heavy-duty 9500-series trucks.

The Petitioner relied upon §84-6610(f)(10) which purportedly allowed the Commission to invalidate the granting of a new or additional franchise agreement within the "community or territory" of the existing dealer unless the manufacturer could prove that the existing dealer was inadequately representing that manufacturer in the community or territory. GMC and Trade City filed constitutional objections to the proceeding on various grounds, including that this provision of the Act violated the Commerce Clause and Supremacy Clause of the United States Constitution.

In February 1976, the matter proceeded to a hearing before the Commission. Section 84-6604(a) of the Act requires the Commission to have nine members, five of whom must be dealers. In this case, it was shown that three of the members of the Commission have truck dealerships located within Petitioner's "community or territory" (as determined by the Commission) and in direct competition with the proposed franchisee, Trade City, in the sale of light, medium and heavy duty trucks (RGFPC

84-91). GMC and Trade City also filed constitutional objections on the basis that the statutory makeup of the Commission (i.e. majority of existing dealers) was impermissibly biased and did not comport with the concepts of due process of the Fourteenth Amendment to the United States Constitution.

After GMC and Trade City's constitutional objections were overruled the matter proceeded on the factual issues set forth in §84-6610(f)(10). The evidence showed that Trade City had an excellent sales and service record in Cobb County. In 1971, in an effort to expand its business, Trade City requested GMC to grant it a franchise for a full line of GMC trucks, including the 9500-series. In preparation for the grant of this full line franchise, Trade City spent approximately $350,000 to expand its service facilities, acquire inventory of spare parts for the 9500-series and train mechanics to service the 9500-series, and to increase its capital (T. 89-92, 101, 112).

The evidence at the hearing further showed that Trade City was located twenty-one miles from the Petitioner in a different county and in a different trade area. GMC offered evidence to prove that GMC's market penetration for heavy-duty trucks in the Trade City area was low as compared to other areas of the country. The Petitioner admitted that it preferred not to sell trucks to "non-fleet" customers; that is, customers who bought fewer than ten trucks. The evidence clearly reflected that there was an ample market in the Trade City area for a new 9500-series truck franchise (T. 127-32). Trade City's sales and service abilities were not questioned; nor was its financial ability to sell and service the additional heavy-duty line.

Of particular import for the constitutional issues raised herein are the unequivocal admissions on the part

of the Petitioner that the reason it had filed its administrative complaint was in order to exclude Trade City from competition within the Petitioner's marketing area. The president of Petitioner testified that "when General Motors' dealers or any heavy-duty dealers are added in a metropolitan area, they immediately call on the same accounts, the profit potential is reduced or diminished" and that for that reason Trade City should not be allowed to sell the 9500-series truck (T. 236). Likewise, the chairman of the board of Petitioner agreed with the statement made by a member of the Commission that "the reason for you not liking to have another dealer here . . . is that he is going to be in competition to you and you are going to start cutting prices like we do on cars" (T. 317). It should be further noted in this regard that Petitioner has consistently taken the position throughout its briefs in the courts below that it does not deny that §84-6610(f)(10) is anticompetitive. (*See* Corrected Brief of Appellant in the Supreme Court of Georgia at 34.)

In May 1976, the Commission, ignoring the evidence, entered an order purporting to invalidate the franchise contract between GMC and Trade City for the 9500-series truck. The Commission ruled that the Petitioner's "community or territory" was a 37-county area stretching from Alabama to South Carolina. Under this ruling, GMC could not award a franchise for the 9500-series truck to Trade City or any other dealer in this area.

GMC and Trade City appealed the Commission's ruling to the Superior Court, which reversed the Commission's order. The Superior Court held that the restriction on additional franchises in §84-6610(f)(10) created an undue burden on interstate commerce and conflicted with the federal antitrust laws and was therefore unconstitutional. The Superior Court also held that the com-

position of the Commission made the Commission inherently biased, thus denying GMC and Trade City due process of law under the Fourteenth Amendment to the United States Constitution.

Petitioner appealed to the Supreme Court of Georgia, which affirmed the trial court on the ground that §84-6610(f)(10) burdened interstate commerce and was therefore unconstitutional. The Court stated, "We view this legislation . . . as purely anticompetitive. . . The Legislature may not use its power to protect a special group from competition." 239 Ga. at 377, 237 S.E. 2d at 197. The Court stated it was not necessary to reach the issue of whether §84-6610(f)(10) conflicts with the federal antitrust laws and would therefore be invalid under the Supremacy Clause. The Court ruled that the Commission was not inherently biased stating that GMC failed to rebut the presumption that state boards are fair and impartial.

REASONS FOR DENYING THE WRIT

I. The Supreme Court of Georgia Correctly Held That the Restriction on Additional Dealers in §84-6610(f)(10) of the Act Unduly Burdens Interstate Commerce, and This Court Need Not Review That Decision.

The Supreme Court of Georgia held §84-6610(f)(10) unconstitutional under the Commerce Clause, U. S. Const. art. I, §8. The Court found that section burdened interstate commerce because its "practical effect" was to limit the number of retail outlets for 9500-series trucks in Georgia. 239 Ga. at 376, 237 S.E. 2d at 196. The Court also found that §84-6610(f)(10) was "purely anticompetitive" and thus served no legitimate public interest.

The Supreme Court of Georgia relied on the rule stated in *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970):

> [W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Petitioner admits that this rule is correct (Pet. 20-21), but challenges the Court's findings that §84-6610(f)(10) burdens interstate commerce and serves no legitimate public interest (Pet. 19, 23-24).

The facts of this case contradict Petitioner's argument. Here, Petitioner sought to exclude Trade City from the market for heavy-duty trucks and thus limit Trade City's ability to compete with the Petitioner and eliminate Trade City as a potential competitor for 9500-series trucks and generally. The Court below stated that limiting the number of retail outlets *is itself* an undue burden on interstate commerce. Petitioner cites no authority for its position that such a limitation does not unduly burden interstate commerce.

Apparently Petitioner claims that the restriction on new dealers in §84-6610(f)(10) does not burden interstate commerce because a manufacturer can attempt to persuade the Commission that it is not "adequately represented." In *Buck* v. *Kuykendall*, 267 U. S. 307 (1925), this Court struck down under the Commerce Clause a Washington statute requiring each common carrier to secure a certificate that the "public convenience and necessity" justified that carrier's operations. To secure this certificate the carrier had to offer evidence similar in many respects

to the evidence required from a manufacturer under §84-6610(f)(10). This Court stated:

> [The statute's] primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. *It prohibits such use to some persons while permitting it to others* for the same purpose and in the same manner.

276 U. S. at 315-16 (Emphasis supplied). The effect of the statute in *Buck* is identical to the effect of §84-6610(f)(10) here.

The decision of the Supreme Court of Georgia was correct and need not be reviewed by this Court.

II. The Decision of the Supreme Court of Georgia Is Not in Conflict With the Cases Cited by Petitioner.

Petitioner urges this Court to grant certiorari because the decision below is alleged to be in conflict with both state and federal decisions. An examination of the cases cited by Petitioner will demonstrate that this assertion is not correct. It should be noted that the only portion of the Act at issue is §84-6610(f)(10), which allows existing dealers to restrict new dealers (or new product lines) in their "community or territory." The cases cited by Petitioner differ both as to the factual subject at issue and the constitutional issues decided by the respective courts.

The decisions cited by Petitioner involve statutory provisions utterly different from §84-6610(f)(10). One of these cases deals with a statute prohibiting dealerships owned by manufacturers ("factory branches"), *Forest Home Dodge, Inc.* v. *Karns*, 138 N.W. 2d 214 (Wisc. 1965);

three deal with statutes prohibiting cancellation of a franchise without cause, *Willys Motors* v. *Northwest Kaiser-Willys*, 142 F. Supp. 469 (D. Minn. 1956); *Kuhl Motor Co.* v. *Ford Motor Co.*, 71 N.W. 2d 420 (Wis. 1955) and *Ruiz* v. *Economics Laboratory, Inc.*, 274 F. Supp. 14 (D. P.R. 1967); another deals with a statute prohibiting a manufacturer from forcing a dealer to accept motor vehicles or parts, *Ford Motor Co.* v. *Pace*, 335 S.W. 2d 360 (Tenn. 1960); and one deals with a statute requiring all motor vehicle dealers to be franchised by a manufacturer and allowing only motor vehicle dealers to advertise new vehicles for sale, *Louisiana Motor Vehicle Commission* v. *Wheeling Frenchman*, 235 La. 332, 103 So. 2d 464 (1958). Thus, these cases clearly do not involve either the factual or constitutional issues of whether existing dealers should be able to restrict new dealers (of new product lines) from their existing "community or territory."

Only one of the cases cited by Petitioner, *Plantation Datsun, Inc.* v. *Calvin*, 275 So. 2d 26 (Fla. Dist. Ct. App. 1973) involved a restriction on new franchises similar to the restriction imposed by §84-6610(f)(10), and *Plantation Datsun, Inc.* neither raises the issue whether such a restriction on new franchises unduly burdens interstate commerce, nor discusses whether a state statute that eliminates competition can serve any legitimate public purpose.

Petitioner also claims that certain federal decisions have "tacitly" recognized the constitutionality of state statutes similar to §84-6610(f)(10) (Pet. 17-18).[2] None of

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2. *Buggs* v. *Ford Motor Co.*, 113 F. 2d 618 (7th Cir. 1940); *E. L. Bowen and Company* v. *American Motors Sales Corp.*, 153 F. Supp. 42 (E.D. Va. 1957); *A.F.L. Motors Inc.* v. *Chrysler Motors Corp.*, 183 F. Supp. 56 (E.D. Wis. 1960); *Best Motor and Implement Co. Inc.* v. *Int'l Harvester Co.*, 252 F. 2d 278 (5th Cir. 1958); *B & T Distributors, Inc.* v. *Meister Brau, Inc.*, 459 F. 2d 29 (7th Cir. 1972); *Bushwick-Decatur Motors, Inc.* v. *Ford Motor Co.*, 116 F. 2d 675 (2nd Cir. 1940); and *Busam Motor Sales, Inc.* v. *Ford Motor Co.*, 104 F. Supp. 639 (S.D. Ohio 1952).

the federal cases cited by Petitioner involved statutes restricting the addition of new franchises. Furthermore, none of these cases raise the issue whether a state statute regulating motor vehicle franchises unduly burdens interstate commerce. These cases are simply irrelevant.

Section 84-6610(f)(10) of the Act is in conflict with the policy expressed by the federal Dealers' Day in Court Act.

Petitioner has attempted to imply throughout its petition that the provision of the Act allowing existing dealers to protest the addition of new dealers is consistent with the purpose and substance of the federal Dealers' Day in Court Act, 15 U.S.C. §1222 (1974). This is patently incorrect and misleading. The legislative history of this federal statute demonstrates that the restriction on additional dealers contained in the Georgia Act clearly *conflicts* with the federal Dealers' Day in Court Act. This was made clear by the House Judiciary Committee in its report on the bill that became the federal Dealers' Day in Court Act:

> The Committee emphasized that the Bill does not afford the dealer the right to be free from competition from additional franchise dealers. *Appointment of added dealers in an area is a normal competitive method for securing better distribution and curtailment of this right would be inconsistent with the antitrust objective of the legislation* under the Bill. A manufacturer does not guarantee the dealer profitable operation or freedom from depletion of investment.

H. R. Rep. No. 2850, 84th Cong., 2d Sess., *reprinted in* [1956] U. S. Code Cong. & Ad. News 4596 (Emphasis supplied).

Petitioner cites the case of *Volkswagen Interamericana S.A.* v. *Rohlsen*, 360 F. 2d 437 (1st Cir. 1966), which arose under the federal Dealers' Day in Court Act. This case merely discusses the public purpose served by this federal statute and had absolutely nothing to do with the provision at issue here [§84-6610(f)(10)], which is in conflict with the stated purpose of the federal Dealers' Day in Court Act.

For these reasons, the decision of the Supreme Court of Georgia is not in conflict with the state and federal decisions cited by Petitioner, and this Court need not review the decision of the Supreme Court of Georgia.

III. The Restriction on Additional Dealers in §84-6610(f)(10) Conflicts With the Federal Antitrust Laws and Is Invalid Under the Supremacy Clause.

Although the Supreme Court of Georgia found it unnecessary to reach this issue, the judgment of that Court should be affirmed because the restriction on additional dealers contained in the Act in effect allows existing dealers horizontally to restrict existing competition and horizontally to prevent new competition. Any existing dealer, by bringing a complaint with the Commission can prohibit a new dealer from being established anywhere in the "community or territory" (as defined in the Act) of the existing dealer. In this case, the Commission found that the "community or territory" of Petitioner was a 37-county area of Georgia stretching from Alabama to South Carolina. Had the Commission's ruling been allowed to stand, Petitioner could prevent Trade City from strengthening its competitive position by adding the 9500-series truck line and at the same time prevent Trade City from becoming a competitor by handling the 9500-

series. Such horizontally-created restraints of trade have no purpose except stifling competition. *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F. 2d 1230 (3rd Cir. 1975). Indeed, in its brief to the Supreme Court of Georgia, Petitioner candidly admitted that §84-6610(f)(10) is in direct conflict with the federal antitrust laws. (*See* Corrected Brief of Appellant in the Supreme Court of Georgia at 34).

For these reasons, if this Court grants the Petition, then it should affirm the decision of the Supreme Court of Georgia on the ground that §84-6610(f)(10) is invalid under the Supremacy Clause.

IV. The Commission, Which Under §84-6604(a) of the Act Is Required to Be Dominated by Dealers, Is Not a Fair and Impartial Tribunal As Required by Due Process.

The Act is enforced by the Commission, which is given broad authority to serve as a tribunal to hear evidence and to adjudicate various legal and economic disputes between vehicle dealers and manufacturers, including the establishment of new dealerships. The Commission is composed of nine members. Section 84-6604(a) of the Act requires that five of these nine members be existing dealers. Existing dealers have an inherent interest in the outcome of the controversies between dealers and manufacturers. Therefore, a Commission composed of persons who have a natural interest in the outcome of such controversies is not disinterested and impartial within the basic concepts of due process under the United States Constitution.

This Court has spoken on the issues of the necessity for a fair and impartial administrative tribunal on numerous occasions. *See Tumey* v. *Ohio*, 273 U. S. 510 (1927); *Berger* v. *United States*, 225 U. S. 22 (1921); *In re Murchison*, 349 U. S. 133 (1955); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292 (1937). The case at bar is particularly controlled by a recent three-judge court case involving the Georgia State Board of Examiners in Optometry which was declared unconstitutional in *Wall* v. *American Optometric Association, Inc.*, 379 F. Supp. 175 (N.D. Ga.), *aff'd mem., sub nom. Hardwick* v. *Wall*, 419 U. S. 888 (1974). The Court pointed out that due process is clearly denied where the members of the Board are representatives of a group that has even an indirect financial interest in the decisions of the Board. *Gibson* v. *Berryhill*, 411 U. S. 564, 578-79 (1973).

The Court below held that the Commission can be presumed to be fair and impartial saying, "It is a common and acceptable practice to appoint members of a profession, business or trade to oversee the practices of that group." 239 Ga. at 375, 237 S.E. 2d at 195. The Court treated the Commission as though it was an ordinary licensing board, and ignored the fact that the Commission serves as a tribunal to decide disputes between dealers and manufacturers, despite the fact that it is by law dominated by existing dealers. This arrangement is neither common nor acceptable under the basic tenets of due process.

In the recent case of *American Motors Sales Corp.* v. *New Motor Vehicle Board*, 69 Cal. App. 3d 983, 138 Cal. Rep. 594 (1977) (Application for hearing denied by the California Supreme Court), the California Court of Appeals held unconstitutional the composition of the California New Motor Vehicle Board, which is similar in function and composition to the Georgia Commission. The

California Commission requires three of the seven members to be dealers. The California court discusses at length the distinction between a mere licensing board where dealers are monitoring dealers, and a board with broad powers to decide economic and judicial disputes between dealers and manufacturers where the economic interests of the two groups are in nowise identical or coextensive. This decision offers persuasive authority for the consideration that such a commission is neither fair nor impartial nor does it comport with the basic tenets of due process.

The Georgia Commission dominated by dealers could in nowise be construed to be disinterested in the outcome of disputes between manufacturers and existing dealers in an issue as to whether or not a new dealer in competition with existing dealers should be added. As was pointed out in the Statement of the Case, in the case at bar three of the members of the Georgia Commission, which ruled that an additional franchise should not be awarded to Trade City, were themselves in direct competition with Trade City within the community or territory which they themselves defined.

Therefore, if this Court grants the petition, it should affirm the judgment of the Supreme Court of Georgia on the additional ground that the Commission is biased in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

Respondent GMC prays that the Petition for a writ of certiorari to the Supreme Court of Georgia be denied; and that if the Petition is granted, this Court affirm the judgment below on the grounds argued in this brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. FELTON JENKINS, JR., attorney for Respondent, General Motors Corporation, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 10th day of November, 1977, I served three true copies of the foregoing Brief In Opposition upon the Petitioner and all parties, by depositing in a United States mailbox true copies of said Brief, with first-class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

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